

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2013 MSPB 78

Docket No. DC-0752-10-0264-B-1

Nellie M. Ingram,

Appellant,

v.

Department of Defense,

Agency.

September 30, 2013

Nellie M. Ingram, La Grange, North Carolina, pro se.

Rachael L. Orejana, Esquire, Fort Lee, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This case is before the Board on the appellant's petition for review of the initial decision which affirmed the agency's demotion action. The Board DENIES the appellant's petition for review and AFFIRMS the initial decision.¹

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the regulations, the outcome would be the same.

BACKGROUND

¶2 The appellant served in the non-critical sensitive position of YC-01 Supervisory Store Associate. Initial Appeal File, MSPB Docket No. DC-0752-10-0264-I-1 (AF I-1), Tab 3, Subtab 4k. On June 21, 2007, the agency's Washington Headquarters Services, Consolidated Adjudications Facility (WHS CAF) informed the appellant that it had tentatively determined to deny her eligibility for access to classified information "and/or" to occupy a sensitive position. Initial Appeal File, MSPB Docket No. DC-0752-10-0264-I-4 (AF I-4), Tab 4 at 30 of 55. The WHS CAF provided the appellant with a Statement of Reasons (SOR) advising her that the basis for the tentative denial was that information obtained from an investigation of her personal history and a credit report raised concerns about her trustworthiness, reliability, and judgment. *Id.* The credit report in question was attached, along with instructions on how to respond to the SOR. *Id.* at 31-41 of 55. Upon considering the appellant's response, the WHS CAF denied her eligibility for access to classified information and/or to occupy a sensitive position. *Id.* at 6-8 of 84. The WHS CAF provided the appellant with instructions on how to appeal the denial of her eligibility. *Id.* at 8, 11-12 of 84. After the appellant filed an appeal of her denial of eligibility with the WHS Clearance Appeal Board (CAB), the WHS CAB issued a decision sustaining the denial. *Id.* at 4-6 of 59.

¶3 On November 5, 2009, the agency issued the appellant a notice in which it proposed to demote her from the position of YC-01 Supervisory Store Associate to that of GS-05 Lead Store Associate, a non-sensitive position. AF I-1, Tab 3, Subtabs 4e, 4f. In the notice of proposed demotion, the agency explained that the proposed action was based on the denial of the appellant's eligibility to access classified information "and" occupy a sensitive position. *Id.*, Subtab 4e.²

² This formulation implies that the appellant was eligible for access to classified information, but it appears that she did not have such eligibility.

Although the agency provided the appellant with an opportunity to respond to the notice of proposed demotion orally and in writing, the appellant did not respond. *Id.*, Subtabs 4c, 4e. On January 5, 2010, the agency issued a decision letter sustaining the proposed demotion. *Id.*, Subtab 4c. The appellant's demotion was effected on January 17, 2010. *Id.*, Subtab 4a.

¶4 The appellant timely filed an appeal with the Board. AF I-1, Tab 1. The appeal was subsequently dismissed without prejudice several times in anticipation of dispositive Federal Circuit and Board decisions, including the Board's decisions in *Conyers v. Department of Defense*, [115 M.S.P.R. 572](#) (2010), and *Northover v. Department of Defense*, [115 M.S.P.R. 451](#) (2010). AF I-1, Tab 7, Initial Decision; Initial Appeal File, MSPB Docket No. DC-0752-10-0264-I-2, Tab 6, Initial Decision; Initial Appeal File, MSPB Docket No. DC-0752-10-0264-I-3, Tab 4, Initial Decision.

¶5 On December 22, 2010, the Board issued its decisions in *Conyers*, [115 M.S.P.R. 572](#), and *Northover*, [115 M.S.P.R. 451](#). In these decisions, the Board held that the Supreme Court's decision in *Department of the Navy v. Egan*, [484 U.S. 518](#) (1988), limited Board review of an otherwise appealable action only if that action was based upon a denial, revocation, or suspension of a "security clearance," i.e., a denial of access to classified information or eligibility for such access. *Conyers*, [115 M.S.P.R. 572](#), ¶ 13; *Northover*, [115 M.S.P.R. 451](#), ¶ 13. Accordingly, the Board found in *Conyers* and *Northover* that an adverse action that was based on the agency's decision that an employee was not eligible to occupy a non-critical sensitive position was subject to the same review as other actions under chapter 75, including review of the merits of the agency's decision on eligibility. See *Conyers*, [115 M.S.P.R. 572](#), ¶¶ 13, 32-34; *Northover*, [115 M.S.P.R. 451](#), ¶¶ 13, 30-33.

¶6 Once the Board's decisions in *Conyers* and *Northover* were issued, the instant appeal was re-filed. AF I-4, Tabs 1, 2. Thereafter, the administrative judge reversed the agency's action, finding that the demotion was procedurally

defective. AF I-4, Tab 5, Initial Decision. On review, the Board vacated the initial decision and remanded the appeal for further adjudication regarding the merits of the demotion action. *Ingram v. Department of Defense*, [118 M.S.P.R. 149](#) (2012).

¶7 While the appeal was pending on remand, a divided Federal Circuit panel reversed the Board’s decisions in *Conyers* and *Northover*, holding that the Board cannot review the merits of an agency’s national security determinations regarding an employee’s eligibility to occupy a sensitive position that implicates national security. *Berry v. Conyers*, [692 F.3d 1223](#), 1225, 1237 (Fed. Cir. 2012). Relying on the Federal Circuit’s decision in *Berry*, the administrative judge issued an initial decision affirming the agency’s action. Initial Appeal File, MSPB Docket No. DC-0752-10-0264-B-1, Tab 11, Initial Decision at 1, 5.

¶8 The appellant timely filed a petition for review. Petition for Review (PFR) File, Tab 1. Subsequently, the court vacated its panel decision in *Berry* and granted rehearing en banc. *Berry v. Conyers*, 497 F. App’x 64 (Fed. Cir. 2013). The court issued an en banc decision in which a majority of the court reversed and remanded the Board’s decision in *Northover* and dismissed the appeal in *Conyers* for lack of jurisdiction. *Kaplan v. Conyers*, [No. 2011-3207](#), 2013 U.S. App. LEXIS 17278, at *4, 51 (Fed. Cir. Aug. 20, 2013).³

ANALYSIS

The limited scope of review in *Egan* applies to this appeal.

¶9 In its en banc decision in *Conyers*, the Federal Circuit held that *Egan* prohibits Board review of Department of Defense national security determinations concerning the eligibility of an individual to occupy a “sensitive” position, regardless of whether the position requires access to classified information.

³ The court dismissed the appeal in *Conyers* for lack of jurisdiction because it found that *Conyers* had no cognizable interest in the outcome of the appeal and that, accordingly, the case was moot. *Conyers*, 2013 U.S. App. LEXIS 17278, at *10-11.

Conyers, 2013 U.S. App. LEXIS 17278, at *30-31. In support of this holding, the court found that “there is no meaningful difference in substance between a designation that a position is ‘sensitive’ and a designation that a position requires ‘access to classified information.’ Rather, what matters is that both designations concern national security.” *Id.* at *30. Accordingly, under the Federal Circuit’s decision in *Conyers*, the limited scope of review set forth in *Egan* applies to appeals such as this one, where an adverse action is based on the decision that an employee is not eligible to occupy a non-critical sensitive position. *See id.* at *30-31.

¶10 In *Egan*, the Supreme Court held that the Board does not have authority to review the substance of a security clearance determination, contrary to what is required generally in other adverse action appeals. *Egan*, 484 U.S. at 530-31. The Court held that, in an appeal under [5 U.S.C. § 7513](#) based on the denial of a security clearance, the Board has authority to review only: (1) whether an Executive Branch employer determined the employee’s position required a security clearance; (2) whether the clearance was denied or revoked; (3) whether the employee was provided with the procedural protections specified in [5 U.S.C. § 7513](#); and (4) whether transfer to a non-sensitive position was feasible. *Conyers*, 2013 U.S. App. LEXIS 17278, at *6 (citing *Egan*, 484 U.S. at 530). The Court ruled that “[n]othing in the [statute enacting [5 U.S.C. § 7513](#)] . . . direct[ed] or empower[ed] the Board to go further.” *Egan*, 484 U.S. at 530. Our review of the appeal is therefore limited to the issues set forth by the Court in *Egan*.

The agency’s action must be affirmed under *Egan*.

¶11 On review, the appellant contends that she was never given eligibility to occupy a sensitive position and that she was not provided with the requisite training that would have enabled her to maintain her eligibility. PFR File, Tab 1 at 1-2. The appellant further contends that the administrative judge failed to

discuss all aspects of her original appeal. *Id.* at 1. In this regard, the appellant appears to assert that the administrative judge did not allow discussion of whether her position entailed access to classified information. *Id.*

¶12 In applying the limited scope of review under *Egan*, we must affirm the agency's demotion action. The record reflects that the appellant's position as a Supervisory Store Associate required that she maintain eligibility to access non-critical sensitive information. AF I-1, Tab 3, Subtab 4k. While the appellant claims she was not provided with the requisite training on how to keep her eligibility, PFR File, Tab 1 at 2, this argument is beyond the scope of review set forth in *Egan*. *See Egan*, 484 U.S. at 530.

¶13 Furthermore, it is undisputed that the WHS CAF denied the appellant's eligibility for access to classified information and/or to occupy a sensitive position, and that the CAB sustained the denial of her eligibility. AF I-4, Tab 4 at 4-6 of 59, 6-8 of 84. In addition, the agency complied with the procedural protections specified in [5 U.S.C. § 7513](#) in demoting the appellant to a vacant non-sensitive position. Specifically, the agency provided the appellant with 30 days' advance written notice of the proposed demotion, reasons for the proposed action, and a reasonable opportunity to reply. AF I-1, Tab 3, Subtab 4e; *see* [5 U.S.C. § 7513](#)(b)(1) and (2). The agency further notified the appellant of her right to be represented by an attorney and provided her with a written decision letter. AF I-1, Tab 3, Subtabs 4c, 4e; *see* [5 U.S.C. § 7513](#)(b)(3) and (4). Therefore, the agency complied with the minimum due process requirements set forth in *Egan* in removing the appellant. *See Doe v. Department of Justice*, [118 M.S.P.R. 434](#), ¶ 23 (2012).

¶14 Regarding the appellant's assertion that the administrative judge did not allow discussion of whether her position entailed access to classified information, PFR File, Tab 1 at 1, the court in *Conyers* held that "[t]here is nothing talismanic about eligibility for access to classified information." *Conyers*, 2013 U.S. App. LEXIS 17278, at *50-51. Rather, "[t]he core question is whether the [a]gency

determination concerns eligibility of an employee to occupy a sensitive position that implicates national security.” *Id.* at *51. Accordingly, because the issue of whether the appellant actually had access to classified information is not dispositive, the appellant has failed to show that any decision by the administrative judge to exclude discussion of classified information prejudiced her substantive rights.

¶15 It is well settled that, where an adverse action is based on denial or revocation of a security clearance, the action promotes the efficiency of the service. *See Robinson v. Department of Homeland Security*, [498 F.3d 1361](#), 1365 (Fed. Cir. 2007) (in an adverse employment action based on failure to maintain a security clearance required by the job description, “the absence of a properly authorized security clearance is fatal to the job entitlement”). Because the Federal Circuit has concluded that non-critical sensitive positions that implicate national security are analogous to positions requiring security clearances, *Conyers*, 2013 U.S. App. LEXIS 17278, at *50-51, we find that the agency’s demotion action in this case promoted the efficiency of the service and must be affirmed.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.